IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
March 12, 2002 Session

STATE OF TENNESSEE v. WILLIAM TONY WRIGHT

Direct Appeal from the Circuit Court for Rutherford County
No. M-43411 & F-49336 J. S. Daniel, Judge

No. M2001-01418-CCA-R3-CD - Filed June 19, 2002

Defendant, William Tony Wright, pled guilty to one count of violation of the Motor Vehicle Habitual Offender Act (MVHO), Tenn. Code Ann. § 55-10-616, a Class E felony. Pursuant to a negotiated plea agreement, wherein other pending charges were dismissed, he was sentenced as a Range II, multiple offender, with the length and manner of service to be determined by the trial court. Thirty days later, and prior to the sentencing hearing, Defendant filed a motion to dismiss the count of the indictment to which he had previously pled guilty. In the alternative, Defendant moved to withdraw his guilty plea. Defendant asserted that he should be allowed to withdraw his guilty plea because he was "legally innocent" of the charge of violation of the MVHO Act. He argued that the order declaring him a motor vehicle habitual offender was not effective at the time of the offense because the order failed to comply with Rule 58 of the Tennessee Rules of Civil Procedure. On the same date, he filed a motion in Rutherford County Circuit Court Case No. M-43411 to obtain relief from the order declaring him an habitual motor vehicle offender pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure. Both motions were denied by the trial court, and following a sentencing hearing, Defendant was sentenced to serve four years in the Tennessee Department of Correction. Defendant has appealed in both cases, and they have been consolidated for our consideration. In addition to appealing the denial of his motions, Defendant argues that the sentence for violation of the MVHO Act is excessive. After a review of the record, we affirm the judgments of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court Affirmed.

THOMAS T. WOODALL, J., delivered the opinion of the court, in which JOE G. RILEY and JOHN EVERETT WILLIAMS, JJ., joined.

Merrilyn Feirman, Nashville, Tennessee (on appeal); and Gerald L. Melton, District Public Defender; and Jeffrey S. Henry, Assistant Public Defender, Murfreesboro, Tennessee (at trial) for the appellant, William Tony Wright.

Paul G. Summers, Attorney General and Reporter; Gill Geldreich, Assistant Attorney General; William C. Whitesell, Jr., District Attorney General; and Roger Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

In order to properly address Defendant's issues, it is necessary to set forth, in chronological order, the proceedings which transpired leading up to, and concluding with the conviction from which he has appealed. All proceedings were in the Rutherford County Circuit Court. In December 1997, an indictment in Case No. 42962 was pending wherein Defendant was charged with driving on revoked license, fourth offense. On December 11, 1997, the District Attorney filed and served on Defendant's counsel in that criminal proceeding, a "petition" to declare Defendant a motor vehicle habitual offender, pursuant to Tennessee Code Annotated section 55-10-618. The case number for the MVHO proceedings is M-43411. Also, on December 11, 1997, Defendant, his counsel, and the trial court, signed Defendant's waiver of his right to ten days notice prior to the trial court ruling on the State's petition to declare him a motor vehicle habitual offender.

Furthermore, the same day, Defendant pled guilty to the offense of driving on a revoked license in Case No. 42962. This was the "triggering offense" for Defendant to be declared a motor vehicle habitual offender. Under the "special conditions" portion of the standard form judgment in Case No. 42962, there is included, "Defendant is declared a Motor Vehicle Habitual Offender." The judgment in Case No. 42962 was signed by the trial court, the prosecutor, and Defendant's counsel. The judgment in the criminal case was filed December 15, 1997. On December 16, 1997, an order which was dated December 11, 1997, was filed in Case No. M-43411, the MVHO proceeding. This order declared Defendant a motor vehicle habitual offender, and prohibited him from operating a vehicle on the highways of the State of Tennessee for a period of three years, and ordered him to surrender any driver's license to operate a vehicle on the public highways of the State of Tennessee. This order was signed only by the trial court, and there is no certificate of service indicating that a copy of the order was sent to Defendant or his counsel.

Approximately one and one-half years later, on June 10, 1999, a judgment in Case No. F-47084 was filed reflecting that Defendant was convicted of the Class E felony offense of violation of the MVHO Act, that he had pled guilty to this offense on June 7, 1999, and that the offense occurred on September 26, 1998. He was sentenced to serve one year in the Department of Correction.

On May 8, 2000, Defendant was arrested for driving on a revoked license, seventh offense. In July 2000, in Case No. 49336, the Rutherford County Grand Jury returned a two-count indictment against the Defendant, charging him in count one with driving on a revoked license, and in count two with driving in violation of the MVHO Act. Each of these offenses related to the May 8, 2000 incident. Subsequently, Defendant was indicted in Case No. 49799, again with two counts, one for

driving on a revoked license and another for violating the MVHO Act, with both offenses pertaining to an incident on August 22, 2000.

On January 22, 2001, Defendant pled guilty to the MVHO offense in Case No. 49336, pursuant to a negotiated plea agreement. He agreed to be sentenced as a Range II, multiple offender, 35%, and all other charges in Case Nos. 49336 and 49799 were dismissed. As a part of a plea agreement, the length of sentence, and any fine, were to be determined by the trial court following a sentencing hearing. The sentencing hearing was set for February 26, 2001.

On February 21, 2001, counsel for Defendant filed, in the original case declaring him a multiple vehicle habitual offender (Case No. 43411), a "Motion for Relief from Judgment." In this pleading, Defendant argued that the original order declaring him a motor vehicle habitual offender was not effective because it was not signed by Defendant or his counsel and there was no certificate of service, in violation of Rule 58 of the Tennessee Rules of Civil Procedure. The motion for this relief was filed pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure. Also on February 21, 2001, Defendant filed a motion in Case No. 49336 requesting the court to dismiss the count to which he had pled guilty on January 22, 2001, or in the alternative, allow him to withdraw his guilty plea. The basis of this motion was that the order declaring him an habitual motor vehicle offender was not effective, and his lawyer had not advised him that he was "legally innocent" of the charge prior to the entry of his guilty plea. The trial court denied both motions and sentenced Defendant to serve four years in the Department of Correction for his conviction of violation of the MVHO Act in Case No. 49336.

In this appeal, Defendant has presented three issues, which are paraphrased here:

I. Whether Defendant's counsel's failure to inform Defendant that he may be "legally innocent" is a "fair and just" reason for the withdrawal of Defendant's guilty plea to violation of the MVHO law in Case No. 49336.

II. Whether thirty days is a "reasonable time" to file a motion pursuant to Rule 60.02, Tennessee Rules of Civil Procedure, seeking relief from the order declaring Defendant to be a motor vehicle habitual offender.

III. Whether the trial court erred by imposing the maximum sentence.

MVHO ORDER AND MOTION TO WITHDRAW GUILTY PLEA

Determination of the first two issues turns upon resolution of whether Defendant should have been granted relief from the order declaring him a motor vehicle habitual offender pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure. Defendant's motion asserted that the order was not in compliance with the provisions of Rule 58 of the Tennessee Rules of Civil Procedure, and therefore, was not effective against him.

Rule 58 of the Tennessee Rules of Civil Procedure provides in pertinent part as follows:

> Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry:
>
> (1) the signatures of the judge and all the parties or counsel; or
>
> (2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel; or
>
> (3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

Rule 60.02 of the Tennessee Rules of Civil Procedure provides, in pertinent part, that

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. *The motion shall be made within a reasonable time*, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken. (emphasis added).

The State conceded at trial, and again on appeal, that the order declaring Defendant a motor vehicle habitual offender does not comply with all of the requirements of Rule 58 of the Tennessee Rules of Civil Procedure in that it was signed only by the trial court and does not have a certificate of service showing a copy was served upon Defendant. However, the State asserts that since the MVHO proceedings were pursuant to Tennessee Code Annotated section 55-10-618, compliance with Rule 58 is not required. We do not agree. Tennessee Code Annotated section 55-10-618 constitutes an alternative method to initiate a proceeding by which the trial court may declare a person to be a motor vehicle habitual offender. The end result sought by the State in such proceedings is the same, that is, an order declaring a person a motor vehicle habitual offender. It remains that the proceeding is civil in nature, see State v. Sneed, 8 S.W.3d 299, 301 (Tenn. Crim. App. 1999), and therefore, compliance with the Tennessee Rules of Civil Procedure is still required. Nevertheless, we conclude that Defendant is not entitled to relief from the order declaring him a motor vehicle habitual offender.

We are not unmindful of the unpublished opinion in State v. Donnie M. Jacks, No. 03C01-9108-CR-00256, 1992 WL 84220, Anderson County (Tenn. Crim. App., Knoxville, April 28, 1992), no Rule 11 app. filed, mandate issued Sept. 11, 1992. In that case, the defendant was declared a motor vehicle habitual offender on July 25, 1990, pursuant to a default judgment. He was arrested in April 1991, for violation of the MVHO law. On June 12, 1991, the defendant filed a motion to set aside the default judgment pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure. The judgment was not signed by the defendant, and there was no certification that a copy of the judgment had been served on the defendant. Our Court held that since there was not compliance with Rule 58 of the Tennessee Rules of Civil Procedure, that pursuant to Rule 60.02 of the Tennessee Rules of Civil Procedure, the judgment was not in effect when the defendant was arrested. However, Jacks, involved the initial criminal proceeding against the defendant following the declaration of the defendant as a motor vehicle habitual offender. Clearly, there was no proof that the defendant had notice of entry of the order declaring him to be a motor vehicle habitual offender.

As stated by the Tennessee Court of Appeals in Masters by Masters v. Rishton, 863 S.W.2d 702 (Tenn. Ct. App. 1992), the purpose of Rule 58 "is to insure that a party is aware of the existence of a final, appealable, judgment in a lawsuit in which he is involved." Id. at 705. In Rishton, the final order in question contained a certificate of service that all parties had been served with a copy of the order prior to its entry. However, at oral argument in the court of appeals, counsel for the defendant conceded that the order was never actually served upon the plaintiffs. The court of appeals held that even though, on the face of the order, there was compliance with Rule 58, non-compliance with the certificate of service resulted in the judgment not being a final appealable judgment. Id. Pursuant to Rishton, we rely on substance over form. Knowledge of the order entered by a trial court is the primary determining factor.

In the case presently on appeal, Defendant clearly had knowledge of the existence of the order declaring him to be a motor vehicle habitual offender at the time he was charged with the commission of the offense occurring on September 26, 1998, to which he later pled guilty in June 1999. Even though the order, on its face, does not comply with all of the provisions of Rule 58, there is no doubt that Defendant had notice of entry of the order when he pled guilty to the MVHO violation in June 1999, almost a year before the commission of the offense which is the subject of this appeal. It is clear that Defendant is not entitled to relief because of a failure to fully comply with Rule 58, unless he is entitled to relief under Rule 60.02. Taking into consideration the totality of the circumstances, we conclude that Defendant is not entitled to relief pursuant to Rule 60.02. He was in court, represented by counsel, on a criminal charge of driving on revoked license, when his counsel was served with a petition to declare Defendant a motor vehicle habitual offender. He signed a waiver of the ten-day notice requirement, to dispose of the motor vehicle habitual offender matter. He pled guilty to the charge of driving on a revoked license, and that judgment signed by his counsel, the prosecutor, and the trial court, plainly stated that he had been declared a motor vehicle habitual offender. In June 1999, he pled guilty to the offense of violating the MVHO law, which was based upon the order previously filed declaring him to be a motor vehicle habitual offender, the same order he challenges in this appeal. As a result, the motion filed on February 21,

2001, was not filed within a "reasonable time" to grant Defendant relief from the order declaring him to be a motor vehicle habitual offender in Case No. M-43411. Therefore, the trial court did not err in denying Defendant's motion for relief from the order declaring him to be a motor vehicle habitual offender.

Having reached this conclusion, it is axiomatic that the trial court did not err in denying Defendant's motion to withdraw his guilty plea, based upon the assertion that his attorney did not advise him that he was "legally innocent" of the charge of violation of the MVHO law. The basis of this motion to withdraw the guilty plea depended upon a finding that the order declaring him to be a motor vehicle habitual offender was not effective at the time of the commission of the offense on May 8, 2000. Since we have concluded that the order was effective as to Defendant at the time of the commission of this offense on May 8, 2000, we conclude that the trial court did not err in denying Defendant's motion to dismiss the indictment, or in the alternative, allow him to withdraw his guilty plea. Accordingly, Defendant is not entitled to relief on his first two issues.

SENTENCING

The trial court sentenced Defendant to four years, the maximum sentence as a Range II multiple offender. The Defendant does not contest the applicability of, or the weight accorded to, the enhancement factors found by the trial court. Instead, Defendant argues that his sentence is excessive because the trial court failed to consider any mitigating circumstances.

When the defendant challenges the length, range, or manner of service of a sentence, this Court conducts a de novo review of the record with a presumption that the determinations made by the sentencing court were correct. See Tenn. Code Ann. §§ 40-35-401(d), -402(d) (1997). "However, the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). In conducting a de novo review, this court must consider (a) all the evidence at trial and the sentencing hearing, (b) the presentence report, (c) the sentencing principles, (d) the arguments of counsel, (e) the nature and characteristics of the offenses, (f) any statutory mitigating and enhancement factors; (g) any statement that the Defendant made on his own behalf, and (h) the defendant's potential for rehabilitation. See Tenn. Code Ann. §§ 40-35-102, -103, -210(b) (1997). The burden of showing that a sentence was improper is upon the appealing party. See Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments.

In sentencing, if no enhancement or mitigating factors exist, the presumptive sentence for Class B, C, D, or E felonies shall be the minimum sentence in the range, and the presumptive sentence for a Class A felony is the midpoint of the range. See Tenn. Code Ann. § 40-35-210(c) (1997). Where one or more enhancement factors apply but no mitigating factors exist, the trial court may sentence above the presumptive sentence, but still within the range. See Tenn. Code Ann. § 40-35-210(d) (1997). Should both enhancement and mitigating factors exist, the trial court must begin sentencing at the presumptive sentence (i.e., the midpoint of the range for Class A felonies and

the minimum sentence in the range for Class B, C, D, and E felonies), enhance the sentence within the range as appropriate for the enhancement factors and then reduce the sentence within the range as appropriate for the mitigating factors. See id. at § 40-35-210(e) (1997). To facilitate meaningful review, a trial court's final sentencing decision must "identify the mitigating and enhancement factors found, state the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence." State v. Jones, 883 S.W.2d 597, 599-600 (Tenn. 1994). If the trial court's findings of fact are adequately supported by the record, this court may not modify the sentence even if it would have preferred a different result. See State v. Fletcher, 805 S.W.2d 785 (Tenn. Crim. App. 1991).

It is correct that the trial court did not state in its ruling from the bench that it had considered any mitigating factors. However, at the sentencing hearing, Defendant's counsel merely stated that the Defendant was seeking "leniency," without asserting the applicability of any particular mitigating factors. Yet, since the trial court did not indicate that it even considered mitigating factors, our review is *de novo* without a presumption of correctness.

First, Defendant asserts that the trial court did not find mitigating factor (1), that his conduct neither caused nor threatened serious bodily injury. We note from the record that the officer arrested the Defendant after observing him make improper lane changes, and that in the course of driving, the Defendant's fiancé's legs were hanging out the window. Defendant testified that he did not make improper lane changes because he had his "hazard lights" on, and that he was taking his fiancé to the emergency room of a hospital because she had been bitten by a brown recluse spider. Our *de novo* review compels us to conclude that this mitigating factor is not applicable. Next, Defendant contends that the trial court should have applied mitigating factor (3), that substantial grounds existed tending to excuse or justify the defendant's criminal conduct, though failing to establish a defense. Again, Defendant relies upon his testimony that he was driving his fiancé to the hospital for emergency care following a spider bite. Defendant submitted no proof to corroborate his testimony about the medical necessity to drive his fiancé to the hospital for a spider bite, in lieu of ambulance transportation or other transportation by friends or family members. We find that this factor, if applicable, would be entitled to very little weight. Finally, Defendant asserts on appeal that the trial court erred by not applying mitigating factor (11), that although guilty of the crime, the defendant committed the offense under such unusual circumstances that it is unlikely that a sustained intent to violate the law motivated the criminal conduct. Our review of the record shows that this factor is not applicable. Defendant has an extensive history of driving on a revoked and/or suspended license, he had a prior conviction for violation of MVHO law, and when testifying about the offense committed on August 22, 2000 (the charges which were dropped in the negotiated plea agreement), Defendant stated "I just figured I was going to jail on the other one, so I just went ahead and started driving." This particular mitigating factor was clearly inapplicable.

The trial court found four enhancement factors which, as stated above, Defendant does not contest on appeal.

A. Factor (2), the defendant has a previous history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range;

B. Factor (8), the defendant has a previous history of unwillingness to comply with the conditions of a sentence involving release into the community;

C. Factor (13), the felony was committed while on probation from a prior felony conviction;

D. Factor (20), the defendant was adjudicated to have committed a delinquent act or acts as a juvenile that would constitute a felony if committed by an adult.

Our a review of the record shows that all four of these factors are entitled to great weight in Defendant's case. Even if all three of the mitigating factors argued by Defendant on this appeal were applicable, a maximum sentence of four years, due to the great weight to which the enhancement factors are entitled, would be appropriate. Defendant is not entitled to relief on this issue.

CONCLUSION

For the foregoing reasons, we affirm the judgments of the trial court.

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THOMAS T. WOODALL, JUDGE